

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STEVEN OGBORNE, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
COUNCILMAN WILLIAM R.	:	
BROWN III, et al.	:	NO. 97-4374

MEMORANDUM ORDER

Plaintiffs are suing under 42 U.S.C. § 1983 for false arrest and malicious prosecution. Presently before the court is plaintiffs' Motion for Leave to File an Amended Complaint to add former inspector Wendell Butler, Jr. and former chief of police James Clark as defendants.

Leave to amend is freely given in the absence of bad faith, undue delay or prejudice unless such amendment would be futile because it would be subject to dismissal under Federal Rule of Civil Procedure 12(b)(6). See Foman v. Davis, 371 U.S. 178, 182 (1962); J.E. Mamiye & Sons, Inc. v. Fidelity Bank, 813 F.2d 610, 613 (3d Cir. 1987); Adams v. Gould Inc., 739 F.2d 858, 864 (3d Cir. 1984), cert. denied, 469 U.S. 1122 (1985).

Defendants oppose plaintiffs' request on the ground that the claims against Messrs. Clark and Butler are barred by the statute of limitations. Plaintiffs' claims are subject to a two year statute of limitations. See, e.g., Samerica Corp. of Del., Inc. v. City of Philadelphia, 142 F.3d 582, 598 (3d Cir. 1998) (Pennsylvania's two statute of limitations for personal

injury actions applies to § 1983 claims). The statute of limitations, however, is an affirmative defense which can be waived. See Bradford-White Corp. v. Ernst & Whinney, 872 F.2d 1153, 1161 (3d Cir. 1989). It is a defense which must be asserted by each defendant and not by one defendant on behalf of another prospective defendant. Moreover, the claims against the prospective defendants may relate back under Fed. R. Civ. P. 15(c). The proposed claims against Messrs. Clark and Butler are not facially futile.

Defendants also oppose plaintiffs' motion on the ground of undue delay. Plaintiffs represent that they did not seek to join Messrs. Butler and Clark earlier because the extent of their involvement in the occurrences complained of only became clear as discovery progressed. Moreover, delay without prejudice to the opposing party is generally not a sufficient ground for denial of an otherwise proper request to amend. See Boileau v. Bethlehem Steel Corp., 730 F.2d 929, 938-39 (3d Cir. 1984); see also 6 Charles Alan Wright et al., Federal Practice and Procedure § 1488 (2d ed. 1990) (delayed amendment will be allowed in the absence of prejudice). Defendants have made no showing that plaintiffs acted in bad faith or that the existing defendants would be prejudiced by the joinder of Messrs. Clark and Butler. The proposed claims against them are similar to those already pending and should not significantly expand the scope or alter the nature

of the action or require further extensive discovery.

Defendants assert that there is a danger of prejudice to Mr. Butler because at the time of his deposition, he had no notice that plaintiffs might seek to join him. Defendants do not, however, identify any specific question or response at the deposition that would likely have been any different had Mr. Butler then been a party given the duty of any witness to testify accurately, whether he is a party or non-party.

ACCORDINGLY, this day of December, 1998, upon consideration of plaintiffs' Motion for Leave to File an Amended Complaint (Doc. #55) and defendants' response thereto, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and plaintiff shall promptly file and serve their second amended complaint.

BY THE COURT:

JAY C. WALDMAN, J.